United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

74-1096

B

P/S

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. ~~T 2186~~ 74-1096

JOSEPH DE LORRAINE,

Plaintiff-Appellant,

against

MEBA PENSION TRUST, Representing the National Marine Engineers' Beneficial Association, and MILDRED E. KILLOUGH, Individually and in her capacity as Administrator of the MEBA Pension Trust,

Defendants-Appellees.

On Appeal from a Judgment of the United States District Court for the Southern District of New York

AMICUS CURIAE BRIEF

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ISSUE PRESENTED

Whether under the Federal Age Discrimination in Employment Act an employee may, pursuant to a retirement plan, be involuntarily retired before the age of 65.

ARGUMENT

This brief will address itself to the limited question of whether the plaintiff has stated a claim for relief under the Federal Age Discrimination in Employment Act, 29 U.S.C. §621, et seq. The lower court's decision was based, in part, upon an interpretation of the Act which, it is submitted, is erroneous. Section 623(f)(2) of the Act provides that:

> "It shall not be unlawful for ... a labor organization ... to observe the terms of a bona fide ... retirement [or] pension ... plan, which is not a subterfuge to evade the purposes of this Chapter, except that no such employee benefit plan shall excuse the failure to hire any individual...."

The lower court found, in part, that the defendant's elimination of the swinging door policy was pursuant to a bona fide pension plan and, hence, legal; as will be shown, your amicus contends that the legality of any pension or retirement plan under the Act is dependent upon the existence of either a swinging door provision or a close equivalent.

To understand the retirement or pension plan exception to the Act it is necessary to understand its purpose. The Act prohibits discrimination with respect to "compensation, terms, conditions, or privileges of employment" because of age, as well as discrimination in hiring and discharge practices. 29 U.S.C. §623(a)(1). Since a pension is a "privilege" of employment, the framers of the Act were confronted with a

problem. All pension plans are based upon actuarial assumptions which presuppose that a retiree will have worked a fairly substantial number of years during which contributions on his behalf are made, e.g., 15 or 20 years. If, because of the Act, an employer is required to hire an elderly person with few remaining years of work life expectancy, and to enroll him in a pension plan, the funding cost would be prohibitive, and the Act would actually discourage such benefit plans.

Thus, Congress avoided the problem by providing that an employer could discriminate against certain elderly new employees by excluding them from a pension plan because of failure to obtain sufficient years of credited service. The legislative history is specific:

> "This exception serves to emphasize the primary purpose of the bill - hiring of older workers - by permitting employment without necessarily including such workers in employee benefit plans." 2 U.S. CODE CONG. & AD. NEWS, 90th Cong., 1st Sess. 2224 (1967).

See also Hodgson v. American Hardware Mutual Insurance Company, 329 F. Supp. 225 (D. Minn. 1971):

> "A requirement that newly hired older workers be entitled to the same retirement benefit provisions as younger ones would make the cost of funding such retirement plans prohibitive and discourage employers from adopting them." 329 F. Supp. 225 at 229.

On its face, the statute unequivocally says that a pension or retirement plan can never justify involuntary retirement before the age of 65. After stating it shall not be

unlawful to observe the terms of a retirement or pension plan, it provides: "[N]o such employee benefit plan shall excuse the failure to hire any individual." 29 U.S.C. §623(f)(2) (emphasis supplied). Assuming a pension or retirement plan provides for mandatory retirement at some age before 65, a beneficiary could reapply for work on the day after he reached that age and again be surrounded by the protections of the Act until he reached the age of 65. The employer would be required by statute to disregard the retirement plan and to evaluate the application applying the same criteria, excluding age, as are applied to any other new applicant for work.

Hence, in light of the legislative history and the language of the statute itself, it is obvious that, with respect to those plans containing early retirement features, they may only give an employee the option to retire before 65 years of age and receive benefits accumulated as a result of a given number of years of employment. Certainly, Congress didn't intend by using the terms "retirement, pension or insurance plan" in the disjunctive that it was sanctioning "retirement" plans which do not provide pensions or some other form of reward; otherwise, it would not be a "benefit plan," since being fired because of one's age is hardly a benefit.

Contrary to the language of the Act, and the clear congressional intent, the Secretary of Labor has promulgated regulations providing, in part:

> "Thus, the Act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of §4(f)(2). The fact that an employer may decide to permit certain employees to continue working beyond the age stipulated in the formal retirement program does not, in and of itself, render an otherwise bona fide plan invalid insofar as the exception provided in §4(f)(2) is concerned." 29 C.F.R. §860.110.

On the other hand, the Secretary apparently realizes that the Act places an individual who is retired under such a plan upon the same footing as anyone else if he reapplies for the job. Attached hereto as Appendix "A" is a copy of Brennan v. Taft Broadcasting Company, Civil No. 72-426 (N.D. Ala. 1973), in which the Secretary unsuccessfully argued that an employee retired under a pension plan containing a mandatory age 60 retirement provision "was to be considered as any new employee" when he reapplied for his job. It is difficult to comprehend how the Secretary could have assumed such a logically inconsistent posture; the undisputable congressional intent that a beneficiary of a retirement plan be judged as any other individual when he reapplies for work clashes head on with the supposition that the Act permits mandatory retirement in any guise before 65 years of age.

Brennan v. Taft Broadcasting Company, supra, fails to support the contentions of your amicus, but it is believed the decision is of marginal significance as a precedent. The court did not come to grips with the legislative history and statutory

language discussed above and merely assumed that the bona fide employee benefit plan exception permitted mandatory retirement before the age of 65; it also dismissed the contention that the employee could reapply for work as any other new employee with one sentence, setting forth no reasons. The case of Hodgson v. American Hardware Mutual Insurance Company, supra, 329 F. Supp. 225 (D. Minn. 1971), is more important because of the court's analysis of the problem. In holding that an employer who had a pension plan providing for compulsory retirement at age 62 could not mandatorily retire a 62 year old employee who was not enrolled in the plan, the court stated:

> "[C]onceptually there is no difference between a mandatory retirement age of sixty-two and a refusal to hire anyone who is sixty-two years old. This is particularly significant in light of the language in §4(f). Although it permits an employer to observe the terms of a bona fide retirement program, the last clause of §4(f)(2) - 'except that no such employee benefit plan shall excuse the failure to hire any individual' - does not permit the employer to refuse to hire someone because of the terms of such a program. Thus an employer may discriminate according to age by refusing to permit an employee over the maximum entry age - fifty-five years for women in the instant case - to enroll in the Plan or by retiring a person who is a Plan member prior to age sixty-five. However, §4(f)(2) seems to clearly prohibit a refusal by defendant to hire a sixty-three year old woman based on the Plan's compulsory retirement age or a refusal to hire a fifty-six year old woman because she would be unable to participate in the Plan. The legislative history indicates that the latter situation is the one which Congress was most concerned about. A requirement that newly hired older workers be entitled to the same

> retirement benefit provisions as younger ones would make the cost of funding such retirement plans prohibitive and discourage employers from adopting them. However, it is germane that the language of §4(f)(2) clearly encompasses the former circumstances and that the employer interests which the Act overrides are substantially the same in both cases." 329 F. Supp. 225 at 229, (emphasis supplied).

The above case is factually distinguishable from the instant case because the worker was not covered by the pension plan in question. Nevertheless, the reasoning of the court would be equally applicable to a worker who was formerly covered by a plan and who reapplies for work after reaching the retirement age provided for in the plan.

To sum up, the purpose of the employee benefit plan exception to the Age Discrimination in Employment Act was to encourage the employment of elderly workers and not to sanction compulsory retirement before the age of 65. Both the pertinent legislative history and the language of the statute require that conclusion. As a consequence, under any pension or retirement plan, as long as an employee is under 65 years of age, he must be given the option of either continuing his employment or retiring with his pension; if he elects the latter option, he has the right to reapply for work and be judged as any other new applicant.

CONCLUSION

In the instant case, the plaintiff alleges that his union has discriminated against him because of his age through its influence over the trustees of the defendant pension trust. Assuming those allegations are true, under no circumstances can the defendant excuse itself by taking refuge in §623(f)(2) of the Act.

DATED: April 4, 1974.

RESPECTFULLY SUBMITTED:

Robert B. Gillan

ROBERT B. GILLAN, ESQ.
NATIONAL SENIOR CITIZENS LAW CENTER

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION.

FILED IN CLERK'S OFFICE
NORTHERN DISTRICT OF ALABAMA
JUN 27 1973
WILLIAM E. DAVIS
CLERK, U. S. DISTRICT COURT
DEPUTY CLERK

PETER J. BRENNAN, Secretary of Labor, United States Department of Labor,

Plaintiff

vs.

FAYT BROADCASTING COMPANY, a Corporation,

Defendant

CIVIL ACTION

NO. 72-426

In conformity with the Findings of Fact and Conclusions of Law contemporaneously filed herewith,

It is ORDERED, ADJUDGED and DECREED by the Court that plaintiff is not entitled to the relief for which he prays, and that this action be and the same is hereby dismissed.

DONE this 27th day of June, 1973.

Seybourn H. Lynne
UNITED STATES

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FILED IN CLERK'S OFFICE
NORTHERN DISTRICT OF ALABAMA
JUN [illegible] 1973
WILLIAM E. DAN
CLERK, U. S. DISTRICT COURT
BY _____ DEPUTY

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,

Plaintiff,

v.

BROADCASTING COMPANY,
Corporation,

Defendant.

CIVIL ACTION

NO. 72-426

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties appeared on the date set for trial and agreed that they were ready to stipulate the facts and that no oral hearing was necessary. Stipulations were entered upon and the Court now makes and adopts the following Findings of Fact and Conclusions of Law.

Plaintiff claims that Rufus Jones, a former employee of defendant, was involuntarily retired by defendant in violation of the Age Discrimination in Employment Act of 1967 (29 USC, §621 et seq). Plaintiff contends that the defendant's Profit Sharing Retirement Plan was not bona fide as required by the statute and also that when Jones reapplied for his job he was to be considered as any new employee.

Jones maintains that he was unaware of the provisions, contained in Section 5.1[a] which provides that all employees retire at age 60. The evidence does show, however, that a summary of the plan, defendant's exhibit F, was posted in a prominent location at WBRC-TV, where Rufus Jones worked, after December 1972.

The defendant insists that it properly terminated the employment of Rufus Jones pursuant to Article V, Section 5.1 of its Employees' Divisional Profit Sharing Retirement Plan.

permitted by 29 USC, §623(f)(2).[1] The Court agrees with defendant and finds that there was no violation of the Age Discrimination in Employment Act of 1967 as a result of the involuntary retirement of Rufus Jones.

The defendant purchased station WBRC-TV in Birmingham in 1957 and in 1959 instituted the Employees'Divisional Profit Sharing Retirement Plan, hereinafter called the Plan. Although the Plan has been amended several times since 1959, that portion which dealt with the age of retirement (Article V, Section 5.1) has remained unchanged since the inception of the Plan.

Rufus Jones was an employee of station WBRC-TV when the defendant purchased it. He became eligible for membership in the Plan in 1963 and signified his desire for membership by signing a form provided by defendant. This form is exhibit A to the stipulation and provides in part that Jones agreed to the terms and provisions of the Plan as then in effect or thereafter amended.

Jones was a television technician and a member of a local union which had a contract with the defendant. This contract, entered into in 1967 and renewed in 1969, required in Section 160 that the defendant keep all terms of the Plan in effect for the term of the contract. This contract was in effect when Rufus Jones retired on June 1, 1970.

The Plan provider in Article V, Sections 5.1[a] and 5.1[b]

> Section 5.1. Retirement Under Plan. 5.1[a] Normal Retirement. The normal retirement date for each Participant shall be the first day of

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[1] It shall not be unlawful for an employer, employment agency, or labor organization--

(2) to observe the terms of a bona fide seniorty system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual;

June coinciding with or next following the date on which he has attained age 60. A Participant terminating his employment on his normal retirement date shall be retired under the Plan as of such date.

5.1[b] Later Retirement. A Participant, with the approval of the Company, may remain an Employee after his normal retirement date. In such event, he shall be retired under the Plan as of his later date of termination of employment.

Jones, after he was told that he must retire on June 1, 1970,[2] made application for employment with defendant in May, 1970.

The Court is of the opinion that the Plan is a bona fide one and was not used as a subterfuge to evade the purposes of the Act. Rufus Jones was properly retired pursuant to the provisions of Article V. Section 5.1[a] of the Plan as allowed by 29 USC, §623(f)(2). The Court also is of the opinion the defendant was under no obligation to rehire Jones after he had been properly retired under the Plan.

In view of the fact that Rufus Jones became a member of the plan in 1963 and was a member until his retirement in 1970, the Court finds his present contention that he was unaware of the retirement age under the Plan irrelevant and immaterial to the issues presented in this case.

Done and Ordered, this the 27th day of June, 1973.

United States District Judge

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[2] Jones became 60 on October 7, 1969.